

*a***PUBLIC PROSECUTOR****v.****TING SING YONG & ORS***b*

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[CRIMINAL APPEAL NO: 20-41-5 OF 1996]
4 SEPTEMBER 1997

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CRIMINAL PROCEDURE: *Search warrant - Common gaming house - Condition precedent to search warrant - Whether conditions fulfilled - Whether senior police officer competent to issue search warrant - Common Gaming House Act 1953, ss. 16(1), 18(1)(a) to (d)*

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CRIMINAL PROCEDURE: *Trial - Presumptions against accused - Statutory presumptions - Whether presumptions raised could be rebutted during prosecution case*

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CRIMINAL PROCEDURE: *Acquittal or discharge - Acquittal of accused without calling upon defence - Whether magistrate correct in acquitting and discharging accused*

CRIMINAL PROCEDURE: *Accomplice - Whether prosecution witnesses were accomplices of respondents - Whether evidence of the prosecution witnesses could be relied upon*

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The respondents were charged with gaming in a common gaming house under s. 6(1) of Common Gaming Houses Act, 1953 ('the Act'), but they were acquitted and discharged. The Public Prosecutor ('PP') contended that there was evidence to show that the place raided was used for gaming and that the respondents were arrested at the scene of the crime and so the presumption under s. 6(2) of the Act arose. It was further submitted that as the raiding party was led by a senior police officer, s. 16 and s. 17 of the Act had been complied with and hence no search warrant was necessary. It was also the submission of the PP that the prosecution witnesses PW1 and PW2 were the accomplices of the respondent and they had pleaded guilty to the same charge. The respondent in submission, argued that there was no evidence that PW1 and PW2 were their friends and that as they were convicted and sentenced, there was absolutely no interest on their part to lie for the respondent. It was for the court to decide the following issues: (i) whether s. 6(1) of the Act was complied with; (ii) whether PW1 and PW2 were friends of the respondent; (iii) whether the presumption raised could be rebutted during the prosecution case; (iv) whether the magistrate erred in ruling that the prosecution had not proved its case beyond reasonable doubt.

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Held:

- [1] The Common Gaming Houses Act 1953, s. 16(1) ('the Act') requires two things as conditions precedent to the issue of a search warrant under the powers conferred by it. The first is that there must be written information, and secondly, that the person issuing must have, after any enquiry which he may deem necessary, good reason to believe that a place is kept or used as a common gaming house. *a*
- [2] For an entry under s. 16(1) of the Act, a senior police officer must prove he is competent to issue a search warrant, that is, he is acting on written information or that the condition set out in s. 18(1)(a) to s. 18(1)(d) of the Act exist. These conditions cannot be presumed. *b*
- [3] In the case before the court, it was not proved that the knowledge obtained by the chief inspector was personally acquired, through investigation and personal efforts and that this knowledge satisfied him that there was sufficient ground for a search so as to justify him to an entry under s. 18(1)(c) of the Act. *c*
- [3a] There was also no evidence that the chief inspector received the required information orally. No evidence was adduced of the circumstances that the object of a search would in his opinion be defeated by the delay necessary for reducing the information into writing. The chief inspector had not satisfied the requirement under s. 18(1)(d) of the Act, in that the name and address of the informer were known or could be ascertained by him. The court therefore held that the entry was not under the provisions of s. 18(1)(a) to s. 18(1)(d) and so no presumption under ss. 6(2) and 19 of the Act arose. *d*
- [4] The court found that there was no evidence that the prosecution witnesses, PW2 and PW3, were friends or that they lied in court when they said that they were not gambling. It was the court's opinion that the learned magistrate came to the correct finding of fact that the respondents were not gambling. *e*
- [5] *PP v. Lin Lian Chen* held that statutory presumptions raised during prosecution may even be rebutted during the prosecution case itself, and so, had the presumption under s. 6(2) of the Act arose, the presumption had been rebutted by the prosecution's own evidence, that of the testimony of the prosecution witness, who testified that the respondent were not gambling. *f*

*g**h**i*

- a* [6] The learned magistrate was correct in finding that the prosecution had not made out a case against the respondent beyond all reasonable doubt.

[Appeal dismissed.]

Cases referred to:

- b* *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1993] 4 CLJ 112 (*cit*)
Abdul Kareem v. Reg [1957] 23 MLJ 185 (*refd*)
Khoon Chye Hin v. Public Prosecutor [1961] 27 MLJ 105 (*cit*)
Lee Ching Seng v. Public Prosecutor [1954] 20 MLJ 181 (*refd*)
Periasamy v. Public Prosecutor [1966] 1 MLJ 138 (*cit*)
Public Prosecutor v. Lim Joo Soon [1978] 2 MLJ 127 (*cit*)
c *Public Prosecutor v. Lin Lian Chen* [1992] 1 CLJ 2086 (*cit*)
Public Prosecutor v. Tan Ann Chuan & 30 Ors [1979] 1 MLJ 246 (*refd*)
Tua Kin Lin v. Public Prosecutor [1970] 2 MLJ 61 (*cit*)

Legislation referred to:

- d* Common Gaming Houses Act 1953, ss. 6(1), (2), 16(1), 17, 18(1)(a), (b), (c), (d),
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For the appellant - Awang Armadajaya bin Awang Mahmud, DPP

For the 1st respondent - In person

For the 3rd respondent - Dr Chew Peng Hui; M/s Battenberg & Talma, Advoc

- e* *Reported by Michele Saw*

JUDGMENT

Tee Ah Sing J:

- f* This is an appeal by the Public Prosecutor against the decision of the learned magistrate whereby he acquitted and discharged the 3rd accused ('the 1st respondent'), the 4th accused and the 11th accused ('the 3rd respondent') who were charged with gaming in a common gaming house under s. 6(1) of the Common Gaming Houses Act 1953 ('the Act').
- g* The prosecution evidence is that at about 6pm on 13 February 1993, PW3 Chief Inspector Peter anak Umbuas led a police party to a gambling raid at No. 3D, Tekam Road, Sibul. PW3 and the police party alighted from the van and proceeded to the said place which is actually a workshop. Upon approaching the place, PW3 saw a group of people surrounding a table in a
- h* small room, presumably office. Some were standing whilst some were sitting.

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The police party entered and introduced themselves as policemen. When they were aware of the presence of the police party they become very busy and some of them were taking money from the table and put inside their pockets. The police ordered them not to remove anything but they disobeyed and a commotion took place. PW3 was the first to enter that small room. PW3 seized a piece of holo cloth (Ex. P1), one saucer (Ex. P2), one bowl (Ex. P3), three dices (Ex. P4) and cash amounting to RM45 (Ex. P5).

PW3 ordered PC Sebastian Thomas (PW4) to make a body search on each of them. There were twelve of them including the 3rd, 4th and 11th accused persons. From the body search made cash were found on 1st accused to the 10th accused. No money was found on the 11th and 12th accused.

Expert evidence on the game of holo was given by Chief Inspector Tieu Leong Seng (PW6). The evidence of PW6 confirms that the game played with the exhibits seized was holo which is a banker game.

Yap Chung Jin (PW1) stated in his examination-in-chief that on 13 February 1993 at 6pm he was gambling at the workshop. He was playing the game of holo with a few others. He also stated "if I see their faces, I can still recognise them (those gambling with me). None of them is in court now."

In cross-examination PW1 was asked "The people gambling with you are not in court today, you are sure of that" and he answered "I am sure."

Sia Yew Hueng (PW2) stated in his examination-in-chief that on 13 February 1993 he was gambling at Ah Seng Motor Workshop. There were 8 to 9 persons playing the game of holo. He also said "If I see them I can recognize them. None of them is in court now."

In cross-examination he was asked "None of these accused person was gambling there?" He answered "Correct"

On grounds 2.1, 2.2, 2.3, 2.4 and 2.5 of the petition of appeal, the learned Deputy Public Prosecutor ('the DPP') submitted that the evidence of PW1, PW2, PW3 and PW4 show that Ah Seng Motor Workshop was used for gaming and that the respondents were arrested at the scene of crime. The presumption of s. 6(2) of the Act arises even if s. 16 and 17 are requirements of the presumption in the Act.

In respect of grounds 2.7 and 2.8, it was submitted that s. 16 and 17 of the Act has been complied with. The raiding party was led by a senior police officer to conduct a gambling raid. It was thus submitted that the search warrant is not mandatory if a senior police officer himself led the raid. The situation is similar to a case where a DPP issues consent to prosecute when the DPP himself conducted the prosecution.

- a* In respect of ground 2.9, it was submitted that the police entered the premises concerned. It was submitted that PW1 and PW2 are accomplices and they were at the scene of the incident. PW1 and PW2 were among those arrested and had pleaded guilty to the same charge. Both have good reasons to try and save their friends the respondents. Their evidence must be properly scrutinised.
- b* There is a need to see which evidence of PW1 or PW2 which can be accepted and which should not be accepted. In support the cases of *Tua Kin Lin v. Public Prosecutor* [1970] 2 MLJ 61 and *Khoon Chye Hin v. Public Prosecutor* [1961] 27 MLJ 105 were cited. It was also submitted that the learned magistrate failed to make maximum evaluation of the evidence adduced when the prosecution has proved its case beyond reasonable doubt.
- c* It was further submitted that impeachment was not the only way out if some witnesses are in contradiction to other witnesses especially when they are accomplices.
- d* The learned counsel for the 3rd respondent submitted that the uncontradicted evidence of PW1, PW2 and PW3 show that the respondents were not gambling.
- e* It was submitted that until there is evidence that the respondents are involved in the crime together with PW1 and PW2, then PW1 and PW2 cannot be held to be accomplices.
- It was also submitted that PW1 and PW2 are at the material times of their testimonies convicted and sentenced for their crime. Because of this where is their interest to lie either for the prosecution or the respondents.
- f* It was also submitted that there is absolutely no evidence that the respondents were friends of PW1 and PW2, where is the basis for suggesting that PW1 and PW2 might try to help the respondents.
- g* If PW1 and PW2 were impeached if they had made statements to the police implicating the respondents then the picture may well be different. The point is the prosecution did exactly nothing.
- h* PW1 and PW2 cannot be accomplices if there is no evidence to prove that the respondents were gambling with them. On the evidence of PW1 and PW2. the respondents were not gambling and the learned magistrate was right in not calling for the defence. If one proceeds on the evidence of PW3 the testimony is that the respondents might or might not be gambling, on that basis the defence should not be called because there is a big question mark which the prosecuting officer did not attempt to resolve.
- i*

On the evidence assuming the presumption in s. 6(2) of the Act is applicable, that presumption has been rebutted from the evidence of the prosecution witnesses. Presumption can be rebutted even during the prosecution's case. In support the cases of *Public Prosecutor v. Lin Lian Chen* [1991] 1 MLJ 316 at p. 320 and *Public Prosecutor v. Lim Joo Soon* [1978] 2 MLJ 127 at p. 129 were cited.

*a**b*

In reply to the submission of the learned DPP, it was submitted for the presumption under s. 6(2) of the Act to apply, Ah Seng motor shop must have been entered under the Act. The words "on the occasion of its being entered under this Act" require the court to look at the procedure prescribed by s. 16 and 17 of the Act.

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If there is no warrant issued under s. 16 for a common gaming house to be entered then the common gaming house cannot be said to have been entered under the Act. In the case of *Abdul Kareem v. Reg* [1957] 23 MLJ 185 there was a warrant issued but not in correct form and the court held that the common gaming house has not been entered under the Act.

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In the instant case there is no evidence of any written information. There is no evidence to show that PW3 was satisfied on any written information that Ah Seng motor shop was being used as a common gaming house. So the presumption under s. 19 of the Act does not arise.

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It was further submitted that from p. 27 of the record of appeal, PW5 recorded a statement from the 3rd respondent. In the statement the 3rd respondent told PW5 that he was at Ah Seng motor shop to see the proprietor for the paint work done to his car and that he was not there to gamble.

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The 3rd respondent's case was put to the prosecution. The prosecution should rebut such defence or explanation as part of its case. In support the case of *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 MLJ 209 was cited.

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The 1st respondent adopted the submission of the learned counsel for the 3rd respondent.

In reply the learned DPP submitted that if a warrant is not necessary by the fact that the raid was conducted personally by a senior police officer then it is only important that he has good reason to believe that the place was kept or used as a common gaming house. Under the circumstances as in our present case such a written information is no longer a requirement which can prove fatal to the prosecution's case.

*h**i*

- a* In respect of the evidence of PW1 and PW2, it was submitted that impeachment or declaration of a hostile witness is not necessary. In support the case of *Periasamy v. Public Prosecutor* [1966] 1 MLJ 138 was cited. So it was submitted that PW1 and PW2 are rather inconsistent or unsure of the exact number of people present at Ah Seng motor shop. It was submitted that
- b* s. 6(2) of the Act applies. It is for the respondents to rebut the presumption it can only be done at the defence stage.

The learned DPP also referred to s. 18(1)(c) and 18(1)(d) of the Act.

- c* In *Public Prosecutor v. Tan Ann Chuan & 30 Ors.* [1979] 1 MLJ 246 His Lordship Ajaib Singh J at p. 248 said:

The law on the applicability of the presumptive s. 19 of the Common Gaming Houses Ordinance is well-settled. Before the presumption under s. 19 can arise it must be proved that the entry on the premises was effected in strict compliance with the provisions of the Ordinance.

- d* In *Lee Ching Seng v. Public Prosecutor* [1954] 20 MLJ 181 His Lordship Buhagiar J at p. 182 said:

That presumption can arise only when premises have been entered under the Ordinance. Before the presumption can arise there must be proof of how the entry was made.

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Section 16(1) of the Act provides as follows:

- f* 16(1) A Magistrate or Justice of the Peace or senior police officer on being satisfied upon written information and after any enquiry which he may think necessary that there is good reason to believe that any place is kept or used as a common gaming house may by warrant authorise any person therein named or any police officer with such assistance and by such force as may be necessary by night or by day to enter or go to such place and to search the same and all persons found therein and to seize all instruments or appliances for gaming and all money, securities for money, and other articles
- g* reasonably supposed to have been used or intended to be used for any game or lottery which may be found in such place or on any such persons and also to detain all such persons until they and the said place shall have been searched. If any of the things or circumstances which are made by this Act presumptive evidence of guilt are found in such place or on any person therein, every person found therein shall be taken before a Magistrate to be dealt with
- h* according to law.

- i* Subsection (1) of s. 16 requires two things as a condition precedent to the issue of a search warrant under the powers conferred by it, the first is that there must be written information, and secondly that the person issuing must have, after any enquiry which he may deem necessary, good reason to believe that a place is kept or used as a common gaming house.

Chief Inspector Peter ak. Umbuas (PW3) stated in his examination-in-chief that on 13 February 1993 at 6 pm he led a party to conduct a gambling raid at No. 3D, Tekam Road, Sibul, which was actually a workshop ie, Ah Seng Motor Workshop. *a*

There was no evidence adduced that before the raid PW3 had received information stating that Ah Seng Motor Workshop was kept or used as a common gaming house. There was also no evidence that PW3 reduced that information into writing. There was also no evidence that a search warrant has been issued under s. 16(1) of the Act. *b*

I am of the view that s. 16(1) of the Act has not been complied with. So the presumptions under s. 6(2) and s. 19 of the Act do not arise. *c*

I shall next deal with s. 18(1) of the Act.

Section 18(1) of the Act reads as follows:

18(1) A Magistrate or Justice of the Peace or senior police officer may himself do what he may under ss. 16 and 17 authorise a police officer to do whenever such Magistrate or Justice of the Peace or senior police officer is competent to issue a warrant under the said sections respectively and also in any of the following cases, that is to say: *d*

(a) if any person has within the preceding six months been convicted of having kept or used as a common gaming house the place proposed to be entered; or *e*

(b) if the place proposed to be entered is occupied by a club or society and he has reason to believe that habitual gaming is carried on there; or *f*

(c) if he has personal knowledge of such facts and circumstances as satisfy him that there are sufficient grounds for a search under the said sections respectively; or

(d) if he receives the required information orally and either on oath or not on oath under such circumstances that the object of a search would, in his opinion, be defeated by the delay necessary for reducing the information to writing: *g*

Provided that in this last case the name and address of the person giving such information are known to or ascertained by such magistrate or justice of the Peace or senior police officer before he acts upon such information. *h*

Section 18(1) of the Act permits a magistrate or justice of the peace or senior police officer to do what he may authorise other persons to do when he is competent to issue a warrant, that is primarily after satisfying himself by written information. *i*

- a* A senior police officer may also exercise this power in four other circumstances, namely (a) if any person has within the preceding six months been convicted of having kept or used as a common gaming house the place proposed to be entered; (b) if the place is a club or society and he has reason to believe it is being used for habitual gaming; (c) if he has personal knowledge of such facts and circumstances as satisfy him that there are sufficient grounds for a search under s. 16 and 17; (d) if he receives the required information orally and either on oath or not on oath under such circumstances that the object of a search would, in his opinion, be defeated by the delay necessary for reducing the information to writing.
- b*
- c* There is a proviso to this para. (d) that if the information is not reduced into writing the name and address of the person giving the information are known to or ascertained by a senior police officer before he act upon such information.
- d* In order to justify entry under s. 16(1) a senior police officer must prove he is competent to issue a search warrant ie, he is acting on written information or that the conditions set out in s. 18(1)(a) to s. 18(1)(d) exist. These conditions cannot be presumed.
- e* In the case of s. 18(1)(c) it must be proved that the knowledge was personally acquired and not come by through hearsay and report but through the actual investigation and personal efforts of the senior police officer.
- f* In the case of s. 18(1)(d), the senior police officer must still act on information but if the time factor precludes its recording he may act on it. Again, this is a matter which must be proved by evidence.
- g* In this case Chief Inspector Peter ak. Umbuas (PW3) only stated that he led a police party to conduct a gambling raid at Ah Seng Motor Workshop. There is no evidence that before the raid he received written information that Ah Seng Motor Workshop is kept or used as a common gaming house. Nor is any evidence given that it was his personally acquired knowledge of facts and circumstances that satisfied him that there was sufficient grounds for a search or what these facts and circumstances were, so as to justify him in entry under s. 18(1)(c) of the Act.
- h* There is also no evidence adduced that PW3 received the required information orally.
- i* There is also no evidence adduced of the circumstances that the object of a search would in his opinion be defeated by the delay necessary for reducing the information to writing.

Further the proviso to para. (d) of s.18(1) of the Act provides that if the information is not reduced into writing the name and address of the person giving the information are known to or ascertained by a senior police officer before he acts upon such information.

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There is no evidence adduced by PW3 that the name and address of the informer are known to or ascertained by him. I am of the view that s. 18(1)(d) of the Act has not been complied with.

b

In my opinion therefore the entry was not under the provisions of s. 18(1)(a) to 18(1)(d) of the Act and therefore no presumption under s. 6(2) and 19 of the Act arises.

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The learned magistrate in his ruling (at pp. 39, 40 and 41 of the appeal record) said:

The evidence of PW3 who was the first to enter that small room is very vital in this case. PW3 who was the leader of the raiding party saw a group of people in that small room presumed that they were gambling and he agreed with the suggestion of the learned counsel that they might or might not be gambling. PW3 cannot actually see what each of them was actually doing. Among the twelve accused, some admitted to PW3 that they were gambling but PW3 cannot remember who they were. It did not occur to PW3 that the people present there might have a legitimate business. It only occurred to PW3 that all of them were presumed to be gambling. Notwithstanding that PW1 and PW2 had told the court that the 3rd, 4th and 11th accused persons were not gambling. PW3 still maintained that the three persons were gambling because he believe no reasonable man would be there in that environment.

*d**e*

In cross-examination, PW5, Sgt. Andrew Ling, admitted that he did record a statement from the 11th accused where the 11th accused said he was not gambling at the material time.

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From the evidence of PW1 and PW2, the 3rd, 4th and 11th accused persons were not gambling at the material time. This seems to be consistent with their earlier testimony where only eight or nine people were gambling. Out of the twelve people charged nine pleaded guilty, including PW1 and PW2. This is consistent with the non-involvement of the 3rd, 4th and 11th accused persons in the gambling session at the material time. The evidence of PW3 cannot confirm that the three accused were gambling. He only made a sweeping assumption which cannot be safely relied upon at all.

*g**h*

My finding of facts at this stage is that there is no conclusive evidence showing the 3rd, 4th and 11th accused persons were gambling at the material time.

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a There is no evidence adduced that PW1 and PW2 were friends of the respondents. Therefore I reject the submission of the learned DPP that PW1 and PW2 had good reasons to try and save their friends, the respondents.

b I am of the view that the learned magistrate came to the correct finding of fact that the respondents were not gambling. The learned magistrate did not err in accepting the evidence of PW1 and PW2 that the respondents were not gambling. There is no evidence adduced to show that PW1 and PW2 had lied in court that the respondents were not gambling.

c In *Public Prosecutor v. Lin Lian Chen* [1991] 1 MLJ 316 His Lordship Mohtar Abdullah J at p. 320 said:

It is trite law that statutory presumptions raised during the prosecution case may even be rebutted during the prosecution case itself.

d Assuming for a moment that the presumption under s. 6(2) of the Act arises, the presumption has been rebutted by the prosecution's own evidence, namely the testimony of PW1 and PW2 that the respondents were not gambling.

As such, the learned magistrate was correct in finding that the prosecution has not made out a case against the respondents beyond all reasonable doubt.

e In view of the foregoing, I dismiss the appeal.

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